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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 40

DONALD WADE,

Petitioner,

vs.

NATHAN MAYO, AS STATE PRISON CUSTODIAN OF THE STATE OF FLORIDA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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On the 10th of November, 1947, this case was ordered restored to the docket for reargument, and assigned for hearing immediately following No. 398. Counsel was requested to discuss in brief and argument, the following two questions: (1) The propriety of the exercise of jurisdiction by the District Court in this case, when it appeared of record in the State's motion for dismissal on appeal of *habeas corpus*, that petitioner had not availed himself of the remedy of appeal from his conviction, apparently

open after trial, though now barred by limitation. (2) Whether the failure of Florida to make this objection in this proceeding affects the above problem.

Frankly, after my serious experience and severe shock which I suffered on last Christmas Eve, I do not know whether I am capable at this time of giving serious thought to the questions presented by the Court. However, I will do the best I can under the circumstances.

There does not seem to be any serious dispute but that *habeas corpus* is a remedy recognized by both the State of Florida and the United States as a proper remedy to be used in the courts of either the State or the Federal Government to test the legality where a person is accused of being held in restraint of liberty in violation of his constitutional rights.

Believing that such was the law, the petitioner in this case appealed to the Circuit Court of Palm Beach County, Florida, by way of *habeas corpus,* setting up that he was restrained of his liberty by the denial of the constitutional right of counsel in his trial in the said court (R. 5). The Circuit Court granted a motion to quash the writ (R. 5-6). There was an appeal to the Supreme Court of Florida, and upon motion of the Attorney General, the appeal was dismissed as being frivolous. The only question which I attempted to raise in this *habeas corpus,* was the fact that the petitioner had been denied his right of counsel guaranteed to him by the Constitution of the State of Florida and the United States, and that by reason of this denial to appoint counsel for him when he had requested it, was a denial of due process of law guaranteed to him by the 14th Amendment.

There does not seem to be any doubt but that the Supreme Court of Florida, in dismissing the appeal, passed upon the very question raised in the *habeas corpus* proceeding in the Circuit Courts.

It is true that the Supreme Court in passing upon the Wade appeal, did not set out the reasons for dismissing this appeal, but in the case of *Johnson* v. *Mayo*, State Prison Custodian, 28 Sou. (2d) 585, the Supreme Court did set out in that particular case the reasons for the dismissal in the *Donald Wade* case, the present case before this Court. I quote from this decision at page 586:

"In May, 1945, Donald Wade presented his appeal to this Court from a judgment quashing a writ of habeas corpus theretofore issued by the Circuit Court of Palm Beach County on the petition of Donald Wade alleging that he had been unlawfully convicted of the commission of a felony in Palm Beach County in that 'at the time of his trial, conviction and sentence he was without aid of counsel and the court did not make an appointment of counsel, nor did petitioner waive his constitutional rights to the aid of counsel, and he was incapable adequately of making his own defense, in consequence of which he was compelled to go to trial without the aid of counsel.' It was also alleged that he was ignorant and was also, because of lack of funds, unable to employ counsel; and that he requested the court to appoint counsel for him. He further alleged that he was not guilty of the offense charged.

Motion was made to dismiss the petition on the ground that the appeal was frivolous and on May 14, 1945, we entered an order granting the motion to dismiss on the ground stated.

We recognize the fact that in a great number of cases in other jurisdictions courts have construed provisions of respective State Constitutions similar to ours to guarantee to a defendant charged with a felony the benefit of counsel.

We are also cognizant of the rule in the Federal Courts but we are of the view that those decisions do not control in Florida."

It will be observed that the Supreme Court of Florida said that they were cognizant of the rule in the Federal Courts, but were of the view that those decisions do not control in Florida.

We believe that the right to inquire into restraint of a person's liberty in violation of his constitutional rights is provided by a Federal Statute itself. 28 U. S. C. A. 452 provides:

"POWER OF JUDGES. The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. The order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

In the case of *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. Ed. 1461, 1467, the Supreme Court of the United States said as follows:

"True, habeas corpus cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial; and the 'writ of habeas corpus cannot be used as a writ of error.' These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment. In such a proceeding, 'it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court' and the petitioned court has 'power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject matter or to the

person, even if such inquiry involves an examination of facts outside of, but not inconsistent with, the record.' Congress has expanded the rights of a petitioner for habeas corpus and the '. . . effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the Act of 31 Car. II, chap. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'

"There being no doubt of the authority of the Congress to thus liberalize the common law procedure on habeas corpus in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results that under the sections cited a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to a judgment against him. . . . '. . . it is open to the courts of the United States upon an application for a writ of habeas corpus to look beyond forms and inquire into the very substance of the matter, . . .'

Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of Counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a Federal court's authority to deprive an accused of his life or liberty."

In the case of *Ex Parte Hawk*, 321 U. S. 114-116, 88 L. Ed. 572, 575, the Supreme Court said as follows:

"Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. Salinger *v.* Loisel, 265 U. S. 224, 230-232, 68 L. Ed. 989, 996, 997, 44 S. Ct. 519. But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, see Mooney *v.* Holohan, supra (294 U. S. 115, 79 L. Ed. 795, 55 S. Ct. 340, 98 A. L. R. 406), or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, cf. Moore *v.* Dempsey (261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265); Ex parte Davis, 318 U. S. 412, 87 L. Ed. 868, 63 S. Ct. 679, a federal court should entertain his petition for habeas corpus, else he would be remediless. In such a case he should proceed in the federal district court before resorting to this Court by petition for habeas corpus.

As petitioner does not appear to have exhausted his state remedies his application will be denied without prejudice to his resort to the procedure indicated as appropriate by this opinion."

Frankly, I was following this advice as set out in the opinion of the case of *Ex Parte Hawk, Supra.* Where counsel was refused to a pauper charged with a serious crime when he requested counsel, we respectfully show that this was a violation of not only the State Constitution, but the 6th and 14th Amendments to the Federal Constitution. When the Supreme Court of Florida dismissed the appeal from the Circuit Court in the *habeas corpus* case, we believe that this was a denial of the due process clause of our

Constitution guaranteed by the 14th Amendment. The Supreme Court of Florida said in the case of *John R. Johnson* v. *Nathan Mayo*, as shown in the record at page 72 of the record "We are also cognizant of the rule in the Federal Courts, but we are of the view that those decisions do not control in Florida."

In the case of *Williams* v. *Kaiser*, 323 U. S. 471-485, 89 L. Ed. 398, 406, the Supreme Court of the United States lay down the rule "State Courts are no less under duty to observe the United States Constitution than is this Court. To be sure, authority is vested in this Court to see to it that that duty is observed."

The Supreme Court said in the case of *White* v. *Ragen*, 324 U. S. 760-768, 89 L. Ed. 1348, 1349, as follows:

"When a state court committed to the policy of refusing to entertain original applications for habeas corpus save on a record which excludes on its face the possibility of any trial in that court of an issue of fact, denies an application without opinion or other indication of the ground of its decision, and when the petition relies on allegations of fact to raise Federal questions, it is unnecessary for the petitioner, in order to exhaust his state remedies so as to be in a position to apply to a Federal district court for a writ of habeas corpus, to apply to the Supreme Court of the United States for certiorari to review the judgment of the state court."

In the case of *Henry Hawk* v. *Neil Olson*, 326 U. S. 271-279, 90 L. Ed. 61, the Supreme Court of the United States said:

"Since the enactment of the statute (14 Stat. 385, c. 28, 28 U. S. C. 453), empowering Federal courts to examine into restraints of liberty in violation of the Constitution of the United States, habeas corpus in a Federal court by one con-

victed of a criminal offense is a proper procedure to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution, even though the events alleged to infringe do not appear upon the face of the record of his conviction."

"Where a corrective process is provided by a state to one whose conviction of crime violates a Federal constitutional right, but error in relation to the Federal question of constitutional violation creeps into the record, the Supreme Court has the responsibility to review the state proceedings."

I must admit to the court that under the various decisions rendered by the Supreme Court of the United States relative to the question before you at this time, that I might not have correctly interpreted the decision of the Supreme Court. I know, further, the question itself is rather a delicate question. However, the one point that I wanted to try out in this case was whether a pauper who had requested counsel and it had been refused, could get the Supreme Court of the United States to say that he had been denied due process of law in violation of the 14th Amendment. I thought it was proper for me to carry that question before the Supreme Court of the State, before appealing to the Federal Court. I did this by *habeas corpus*, which is allowed under our law. The Supreme Court said that the Federal Court's decisions do not control in Florida. I could not go any further than that.

Then I could not file a *habeas corpus* at that particular time in the Federal Court to test out the question, for the reason of another sentence of the defendant, and had to wait. I could not have done otherwise. When that time had elapsed, time for any appeal to the United States Supreme Court from the Supreme Court of Florida had

expired. My only remedy was a *habeas corpus* in the Federal District Court. At least, that is what I decided after reading the case of *Hawk* v. *Olson, supra,* in which they set out as follows:

"Refusal of a proper request for counsel, because of the accused's incapacity adequately to defend himself, Williams *v.* Kaiser, 323 U. S. 471, 472, 89 L. Ed. 398, 400, 65 S. Ct. 363, will not support imprisonment. Such procedure violates the Fourteenth Amendment to the Constitution. See Tomkins *v.* Missouri, 323 U. S. 485, 89 L. Ed. 407, 65 S. Ct. 370; Cochran *v.* Kansas, 316 U. S. 255, 86 L. Ed. 1453, 62 S. Ct. 1068. That Amendment is violated also when a defendant is forced by a state to trial in such a way as to deprive him of the effective assistance of counsel. Powell v. Alabama, supra (287 U. S. 52, 58, 77 L. Ed. 162, 165, 53 S. Ct. 55, 84 A. L. R. 527); House *v.* Mayo, 324 U. S. 42, 89 L. Ed. 739, 65 S. Ct. 517. Compare Ex Parte Hawk, 321 U. S. 114, 88 L. Ed. 572, 64 S. Ct. 448; Glasser *v.* United States, 315 U. S. 60, 69, 70, 86 L. Ed. 680, 698, 699, 62 S. Ct. 457. When the state does not provide corrective judicial process, the Federal Courts will entertain habeas corpus to redress the violation of the Federal constitutional right. White *v.* Ragen, 324 U. S. 760, 89 L. Ed. 932, 65 S. Ct. 978. When the corrective process is provided by the state but error in relation to the Federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings. Williams *v.* Kaiser, 323 U. S. 471, 472, 89 L. Ed. 398, 400, 65 S. Ct. 363; Tomkins *v.* Missouri, 323 U. S. 485, 89 L. Ed. 407, 65 S. Ct. 370, supra."

Also, the Federal law provides that the Federal courts will entertain questions where it is claimed that a restraint is made in violation of constitutional provisions of the Federal Constitution. See 28 U. S. C. A. Secs. 451, 452 and 453. These sections of our law specifically provide for

habeas corpus to test out the unlawful restraint in violation of the Constitution. In addition to that, the Supreme Court of Florida, as I have pointed out in several cases, held that it is necessary for an accused to have counsel to secure a fair trial under the laws of this State.

I have tried to keep all other questions out of this case, with the exception of one question where a person is unable, by reason of his poverty, to employ counsel and requests that counsel be appointed to represent him in a serious felony, is it a denial of due process to deny that request of counsel—is such a procedure a fair trial under the constitutional laws of this State or the United States, and does it not violate the Sixth and Fourteenth Amendments of the Federal Constitution?

In the case of *Mooney* v. *Holohan*, 294 U. S. 103, 79 L. Ed. 347, 98 A. L. R. 406, the Supreme Court of the United States seemed to have come to the conclusion that a violation of the Fourteenth Amendment in restraining the liberty of a person can be taken advantage of either in the State Court or the Supreme Court of the United States by way of *habeas corpus*. The Court says:

"We are not satisfied, however, that the State of California has failed to provide such corrective judicial process. The prerogative writ of habeas corpus is available in that State. Constitution of California, Art. 1, Sec. 5; Art. 6, Sec. 4. No decision of the Supreme Court of California has been brought to our attention holding that the state court is without power to issue this historic remedial process when it appears that one is deprived of his liberty without due process of law in violation of the Constitution of the United States. Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution. Robb *v.* Connolly, 111 U. S. 624, 637, 28 L. Ed. 542, 546, 4 S. Ct. 544.

In view of the dominant requirement of the Fourteenth Amendment, we are not at liberty to assume that the State has denied to its court jurisdiction to redress the prohibited wrong upon a proper showing and in an appropriate proceeding for that purpose."

It must be observed that the Supreme Court of the United States has held that the compliance with the Constitutional mandates as contained in the Sixth and Fourteenth Amendments is an essential jurisdictional prerequisite to deprive an accused of his life or liberty. In other words, the question presented is a test to determine the jurisdiction of the state court to proceed to a judgment. The case of *White* v. *Ragen*, 324 U. S. 760-768, 89 L. Ed. 1348, holds: "Due process requires that the defendant on trial in a state court upon a serious criminal charge and unable to defend himself, shall have the benefit of counsel, and that he shall not be forced to trial without such expedition as to deprive him of the effective aid and assistance of counsel."

The question of the jurisdiction of the State Court being brought before the court has always been recognized to be a prerogative of the *habeas corpus* proceeding. This was recognized as a law of this country long before the present statute giving the right of *habeas corpus* to the Federal Courts in cases of the unlawful restraint of liberty. Especially is this true where this restraint of liberty is brought about from the fact that the State Court acted without jurisdiction. "One in custody pursuant to final judgment of state court of criminal jurisdiction may have judicial inquiry in federal court, or before a judge of such court into truth and substance of cause of his detention, even though it is necessary to look behind record of his conviction to test jurisdiction of state court. Flansburg *v.* Kaiser, D. C. Mo. 1944, 54 F. Supp. 423."

In the case of *Hugh Allen Bowen* v. *James A. Johnston*,

306 U. S. 19-30, 83 L. Ed. 455, the Supreme Court said at page 459: "If it be found that the Court had no jurisdiction to try the petitioner, or that in its proceedings his constitutional rights had been denied, the remedy of habeas corpus is available."

Following this argument of the Supreme Court of the United States, we find this enunciation in the case of *Johnston* v. *Zerbst*, 304 U. S. 458, 82 L. Ed. 1461 as follows: "If the accused is not represented by counsel and has not competently and intelligently waived his constitutional rights, the jurisdiction of the court is lost, the judgment of conviction pronounced by the court is void, and release from imprisonment may be obtained by habeas corpus."

Under the many rulings which have been made by the Supreme Court of the United States in the many cases before it where the due process clause of the United States Constitution was involved and under the claim that his constitutional rights had been violated, I was of the candid and honest opinion that you did not have to appeal or ask for certiorari in such cases from the decision of the Supreme Court of the State of Florida. This was purely a constitutional question involved and the jurisdiction of the court was involved. It has been held that the court loses its jurisdiction when it violates the due process by not appointing counsel for an indigent defendant. To hold otherwise would be a confusion in our procedure, which in fact would deny the constitutional provisions of our law of due process.

The next question is whether the failure of Florida to make this objection in this proceeding effects the above problem.

Frankly, I suppose that counsel from the State of Florida believe as I did, that the remedy of *habeas corpus* was available where a person's claims that his constitutional rights have been violated under the due process clause of the Constitution of the United States. Therefore, no

objection was made to the proceedings by the State of Florida.

In addition to that fact, this *habeas corpus* filed in the District Court at Jacksonville, Florida, for the Southern District of Florida, was not filed until long after time of appeal on the decision of *habeas corpus* had expired. This was months after this decision by the Supreme Court of the State of Florida, and on account of the poverty of the defendant, no appeal was thought about at the time at which appeal could have been taken. I think the court must be in error, brought about from the fact that the first *habeas corpus* filed in the District Court might have been made during the time that appeal might have been taken. However, the first *habeas corpus* was denied, without prejudice. Later on another *habeas corpus* was brought, but this was brought, to the best of my recollection, after the time for appeal had expired from the final decision of the Supreme Court of Florida to the United States Supreme Court.

Conclusion

I have been laboring under rather extreme difficulties in attempting to file the foregoing brief. Laboring under these conditions, I have not, it seems, been able to concentrate.

I have endeavored to bring before the Supreme Court of the United States the question as to whether it was a denial of the due process clause of the Constitution of the United States, for a State Court to refuse or deny the appointment of counsel for an indigent defendant unable to employ counsel when charged with a serious felony.

Respectfully submitted,

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